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No. 75-1657

In the Supreme Court of the United States

OCTOBER TERM, 1976

STATE OF NORTH CAROLINA, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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Washington, D.C. 20426.

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In June 1974, the Federal Power Commission issued to the Appalachian Power Company a 50-year license for the construction, operation, and maintenance of a combined conventional and pumped storage hydroelectric project to be located on the New River in the Blue Ridge Mountains of southwestern Virginia and northwestern North Carolina (Pet. App. 62-144). Petitioner filed in the court of appeals a petition for review of the Commission's order, seeking to have it set aside on a variety of grounds. The court of appeals affirmed the Commission's order (Pet. App. 50-61).

After the petition for a writ of certiorari was filed, Congress passed and the President signed Public Law 94-407 (approved September 11, 1976). The Act—which we have reproduced in the appendix to this memorandum,

infra, p. 3—amends the Wild and Scenic Rivers Act, 82 Stat. 906, 16 U.S.C. 1271 *et seq.*, in two respects: (1) it adds to the national wild and scenic rivers system a segment of the New River in North Carolina on which part of the reservoirs from Appalachian Power Company's hydroelectric project were to be located; and (2) it provides that "[a]ny license heretofore or hereafter issued by the Federal Power Commission affecting the New River of North Carolina shall continue to be effective only for that portion of the river which is not included in the National Wild and Scenic Rivers System * * * and no project or undertaking so licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment."

Although the Federal Power Commission believes that its license was validly issued, Public Law 94-407 appears to foreclose Appalachian Power Company's completion of the physical construction of the licensed project. For this reason, we believe it would be appropriate for this Court to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand to that court to consider whether Appalachian's apparent inability to act upon the license, regardless of its validity, renders this case moot. See *United States* v. *New Jersey State Lottery Commission*, 420 U.S. 371.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

DOJ-1976-09

APPENDIX

Public Law 94-407
94th Congress, H.R. 13372
September 11, 1976

An Act

To amend the Wild and Scenic Rivers Act (82 Stat. 906; 16 U.S.C. 1271), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Wild and Scenic Rivers Act (82 Stat. 905), as amended (16 U.S.C. 1271 et seq.) is amended as follows:

(1) In section 2 delete "Maine, and that segment of the Wolf River, Wisconsin, which flows through Langlade County," and insert in lieu thereof "Maine; that segment of the Wolf River, Wisconsin, which flows through Langlade County; and that segment of the New River in North Carolina extending from its confluence with Dog Creek downstream approximately 26.5 miles to the Virginia State line.".

(2) In section 7(a), after the third sentence, insert the following: "Any license heretofore or hereafter issued by the Federal Power Commission affecting the New River of North Carolina shall continue to be effective only for that portion of the river which is not included in the National Wild and Scenic Rivers System pursuant to section 2 of this Act and no project or undertaking so licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment.".

Approved September 11, 1976.